Berkshire Nursing Home, LLC *and* New York's Health & Human Service Union 1199, Service Employees International Union.[1] Case 29–CA–26082

August 26, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 21, 2004, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party Union filed answering briefs.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order[2] as modified and restated in full below.[3]

We disagree with the judge's conclusion that the Respondent violated the Act when it unilaterally changed employees' parking locations. A unilateral change with regard to a mandatory subject of bargaining violates Section 8(a)(5) and (1) only if the change is a "material, substantial, and significant" one. *Crittendon Hospital*, 342 NLRB No. 67, slip op. at 1 (2004). Contrary to the judge, who found this a "closer issue" than the others presented, we do not find the Respondent's changes in employee parking policies to be "material, substantial, and significant."

Prior to the Respondent's change in parking policy, employees were permitted, on a first come, first serve basis, to park in either the back parking lot (also known as the south lot) or the side parking lot (also known as the east lot) on the facility's grounds. Some employees chose to park in neither but on neighboring public streets where permitted by the city. The record reflects that over-parking in the back lot resulted in congestion, blocked cars, double parking, accidents, and other safety issues, including interference with ambulance and vendor traffic. Employees also would illegally park their cars elsewhere, leave them running, then abandon their duty stations to move their cars into the back lot at shift changes. In response to these recurring problems, the Respondent's new policy, announced on December 24, 2003, and implemented on January 2, 2004,[4] prohibited back lot access for most employees, including but not limited to unit employees.[5]

Though, as the judge found, employees may have favored the back lot because of its closer proximity to the facility entrance, the relevant inquiry is not employee preference, but whether the change properly can be characterized as "material, substantial, and significant." Here, we do not find that the difference between a 1-minute walk and a 3 to 5-minute walk from the parking lot to the entrance is a sufficiently significant difference to warrant imposing a bargaining obligation on the Respondent before making this change. At most, such an increase in walking time is a relatively minor inconvenience to the employees, not a statutorily cognizable change in their terms and conditions of employment.

Our dissenting colleague relies on differences in the lots' qualities to support her finding that the change was material, substantial, and significant. We are unprepared on this record to do so. The differences in the lots' qual-

[1] We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO effective July 25, 2005.

[2] We adopt the judge's conclusion that the Respondent acted unlawfully in unilaterally changing the employees' health insurance plans, both by adding new plan options and by increasing employees' costs. As the judge found, these changes were substantial and material, they were not beyond the duty to bargain because of the Respondent's business necessity, and the Union did not waive its right to bargain over them.

We are also not persuaded by the Respondent's newly-raised contention, relying on our decision in *Courier-Journal*, 342 NLRB No. 113 (2004), that no duty to bargain arose because these changes were made as a continuation of a longstanding practice and were essentially a continuation of the status quo. First, the Respondent failed to raise this argument before the judge, although *Courier-Journal* was decided before the hearing. Second, unlike the employer in *Courier-Journal*, the Respondent has not shown that the changes it implemented were consistent with an established past practice, that the changes were the product of limited discretion on its part, or that the Union had previously acquiesced to similar changes within the limits of the longstanding practice.

[3] We modify the remedy to require the Respondent to rescind the additional costs imposed on employees for the continuation of the original health insurance plan, and, at the Union's request, to rescind the unilaterally-offered health insurance plan options. This modification conforms to the standard remedy for unilaterally implemented changes in health insurance coverage: restoration of the status quo ante at the request of the employees' bargaining representative. See, e.g., *Larry Geweke Ford*, 344 NLRB No. 78, slip op. at 1 (2005); *Friendly Ford*, 343 NLRB No. 116, slip op. at 2 (2004). See also *The Brooklyn Hospital Center*, 344 NLRB No. 48 (2005) (make-whole component of remedy does not apply if union chooses continuation of unilateral plan).

[4] All dates are in 2004 unless otherwise indicated.

[5] Further changes, including reopening back lot access to certain employees including those working on the night shift, were announced on April 28, to be implemented on May 2. Many unit employees, however, still were not permitted to park in the back lot after these later changes.

ity—for instance, lighting and potential security concerns—were addressed by the Respondent before it implemented the new policy.[6] No evidence suggests that security incidents increased at the facility following the change in parking policy. Moreover, with regard to one employee's claim that the side lot was dangerous in inclement weather because it was not cleared of snow as promptly as the back lot, the Respondent's administrator, William Cowen, testified without contradiction that the Respondent contracted with the same snow removal service to clear both lots, one after the other. We believe the dissent errs by focusing on the one employee's testimony and concluding that the side lot was "dangerously slippery in inclement weather." The judge generally credited both Cowen and the employee witness. We consider both their testimonies and find the General Counsel has not shown the back lot to be significantly different in terms of safety than the side lot.[7]

Our colleague suggests that a change which "disadvantages" employees must be bargained. However, the test is whether the change is "material, substantial and significant." The mere fact that an employee is "disadvantaged" by the change, although perhaps relevant to the test, is not alone sufficient to satisfy the test.

We consider this case to be in accordance with the precedents of *United Parcel Service*, 336 NLRB 1134 (2001) (unilateral change from onsite to distant offsite parking was unlawful), and *Advertiser's Mfg. Co.*, 280 NLRB 1185 (1986), enfd. 823 F.2d 1086 (7th Cir. 1987) (unilateral prohibition on parking in first row of parking lot was lawful). Contrary to the judge and the dissent, however, we conclude that this case is more analogous to *Advertiser's Mfg.*, where no violation was found, than it is to *United Parcel Service*,[8] or to *Frank Leta Honda*, 321 NLRB 482 (1996),[9] cited by the dissent. The facts in the record simply do not demonstrate that the differences between side lot parking and back lot parking were sufficiently material, substantial, and significant to obligate the Respondent to bargain with the Union before revising its policy. Thus, we find that the Respondent did not violate Section 8(a)(5) and (1) by changing employees' parking without giving notice to the Union and offering to negotiate with it.

ORDER

The National Labor Relations Board orders that the Respondent, Berkshire Nursing Home, LLC, West Babylon, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing new health care plans or increasing the costs of the existing plan without bargaining with the Union.

(b) Refusing to bargain with the Union regarding available health care plans or employees' contributions under these health care plans.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain with the Union, upon request, regarding health care plans and related issues.

(b) Rescind the additional cost for employees' HIP health insurance coverage that was effective March 1, 2004.

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[6] Thus, as stated in the Respondent's December 24, 2003 memo announcing the change in parking policy, regarding the side lot:

> The lighting in the area . . . has been improved. Security assistance will be provided at the change of shifts at midnight. New lines will be painted when the weather permits.

[7] The dissent argues, without evidentiary support, that there were handicapped employees and that the Respondent's new rule would make no allowance for them. The General Counsel properly had the burden of producing such evidence, and did not do so. Consequently, we cannot conclude that any employees fit into this category or, if they did, that Respondent failed to make special arrangements.

We also do not agree with the dissent's implication that the fact that the Respondent, after April 23, 2004, allowed employees on the night shift again to park in the back lot necessarily demonstrates that the Respondent's providing of security assistance in the side lot at the midnight change of shifts before that date inadequately addressed the employees' security concerns. To the contrary, we view the action of April 23, as further minimizing the prior change.

[8] As the judge acknowledged, *United Parcel Service*, supra, involved a significantly greater change than in the instant proceeding. There, the parking lot was relocated offsite 1–½ miles away, requiring the employees to spend 20 minutes more getting to and from work each day, including waiting for a shuttle bus. This resulted in an additional 40 minutes per day in employee commuting time. Conversely, the nature of the change in *Advertiser's Mfg. Co.*, supra, requiring employees to walk a few yards from their vehicles to the plant, is more analogous to the change at issue in this case.

[9] In *Frank Leta Honda*, supra, the Respondent was found to have engaged in extensive and pervasive violations of Sec. 8 (a)(1), (3), and (5) of the Act including illegally encouraging employees to decertify the union. The parking lot change was one of many unilateral changes, including wage increases, wage freezes, and new safety rules used by the employer to encourage the decertification effort. In addition, the parking lot change in that case is distinguishable. It consisted not only of employees parking farther away than previously permitted, but the employees could not see their vehicles from the new location because of a drop in the road and, significantly, at the new location, employee vehicles would be blocked in, preventing or impeding employees from leaving at lunch or in the evening.

Dynatron/Bondo Corp., 324 NLRB 572, 587 (1997), cited by the dissent, is likewise distinguishable. There, not only were the employees assigned a numbered parking space pursuant to a new parking policy, but violations of the rule would result in a verbal warning for the first offense, and towing for a second offense. Unlike here, those changes would have a material effect on employees' terms and conditions of employment.

(c) Make whole its employees for the additional cost for their HIP health insurance coverage that was effective March 1, 2004, or for any other costs that they incurred that were caused by this change.

(d) On request of the Union, rescind the unilaterally-offered health insurance plan options that were effective March 1, 2004.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of reimbursement to the unit employees due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in West Babylon, New York, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2004.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 26, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

Given how it disadvantaged employees, the Respondent's unilateral change in employees' parking options could reasonably lead to the sort of labor dispute that the Act seeks to prevent by requiring collective bargaining. Employees were required to park in a lot that apparently was farther away, less secure, and more dangerous in slippery weather. Indeed, that lot was demonstrably *not* the preferred place to park: the lot once available to employees was now reserved for owners and select staff.

The majority concludes that the Respondent's change was not sufficiently material, substantial, and significant to require the Respondent to bargain with the Union first. But practical application of the standard developed in prior cases leads to the opposite conclusion. I would therefore affirm the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act.[1]

It seems clear that the new lot was significantly less desirable, beginning with distance. The majority concludes that a 3 to 5-minute walk does not differ significantly from a 1-minute walk. In distance and effort, however, the difference can be considerable. A 5-minute walk may be a quarter of a mile or more.[2] Compared to a walk from the back lot, which has direct access to the facility's entrance, it represents a significant change at the beginning and the end of each affected employee's workday.

Even setting aside the side lot's distance from the facility's entrance, the record demonstrates several other ways in which the side lot is inferior to the back lot. First, despite the majority's claims that the side lot's lighting deficiencies had been addressed before the policy was changed, even the Respondent implicitly acknowledged that walking from the side lot to the facility's entrance raised security concerns. It is doubtful that the Respondent's initial offer of security assistance at the midnight shift change adequately addressed the employ-

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to A Judgment of the United States Court of Appeals Enforcing An Order of The National Labor Relations Board."

[1] I join in the Board's decision to affirm the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by making unilateral changes regarding the unit employees' health care plans. Consistent with my dissenting position in *The Brooklyn Hospital*, 344 NLRB No. 48 fn. 3 (2005), however, I would also provide make-whole relief to the unit employees who had been made to pay higher premiums for unilaterally implemented health care plans, even if the Union declines to demand the rescission of these alternative health care plan options.

[2] Even for a healthy employee, this is not insignificant at the end of a work shift; for an employee with physical limitations, it may be overwhelming. The Respondent's memos revising its parking policy do not contain exceptions for employees with physical limitations or those with handicapped-parking permits.

ees' security concerns, given the later reopening of the back lot to midnight shift employees.

Second, the record contains credited testimony that the side lot was dangerously slippery in inclement weather, causing "quite a few" employees to fall and injure themselves. Employee Angela Bollerup testified that the Respondent does not clear snow from the side lot "right away." She and other coworkers spoke to Administrator Cowen about these problems "a couple of times."

Her testimony demonstrates that the side lot was less desirable than the back lot in ways that mattered to employees. In turn, the Respondent's express reservation of back lot parking privileges for "designated staff and owners" clearly demonstrates its awareness that the back lot was a more desirable parking location than the side lot, as well as a conscious decision to grant this preference to those it chose on a unilateral basis.

The Board has previously found similar changes in parking policy unlawful. For example, in *Frank Leta Honda*,[3] the employer unilaterally terminated employees' rights to park in a lot alongside its facility. Under the new policy, the employees were permitted to park only on a narrow side road or in one of four spots at the rear of the facility. This new parking policy forced employees to walk further from their cars to the facility. In addition, the employees could no longer see their cars from the facility, and their cars could be blocked in by delivery traffic on the road. The increased distance and other disadvantages of the newly-required parking locations were sufficient to make the unilateral change a violation of Section 8(a)(5). I find the facts of *Frank Leta Honda* analogous and conclude, contrary to the majority, that the Respondent's unilateral changes to its employee parking policy were unlawful.[4]

Dated, Washington, D.C. August 26, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

[3] *Frank Leta Honda*, 321 NLRB 482, 496 (1996). See also *Dynatron/Bondo Corp.*, 324 NLRB 572, 578 (1997) (holding employer's unilateral imposition of assigned employee parking spaces, enforced by verbal warnings and towing of cars, unlawful).

[4] The majority's reliance on *Advertiser's Mfg Co.*, 280 NLRB 1185 (1986), enfd. 823 F.2d 1086 (7th Cir. 1987), is misplaced. In that case, the employer prohibited employees merely from parking in the first row of its lot. According to the judge in *Advertiser's Manufacturing*, the employer's parking prohibition "at most, required a few employees to walk a few extra yards from their cars to the plant." Id. at 1193.

Here, in contrast, the substantially greater scope and effect of the Respondent's change on the unit employees commands that a violation be found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT implement new health care plans without bargaining with the Union.

WE WILL NOT refuse to bargain with the Union regarding available health care plans or employees' contributions under these health care plans.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Federal labor law.

WE WILL bargain with the Union, upon request, regarding health care plans and related issues.

WE WILL rescind the additional cost for employees' HIP health insurance coverage that was effective March 1, 2004.

WE WILL, make whole employees for the additional cost for their HIP health insurance coverage that was effective March 1, 2004, or for any other costs that they incurred that were caused by this change.

WE WILL, on request of the Union, rescind the unilaterally-offered health insurance plan options that were effective March 1, 2004.

BERKSHIRE NURSING HOME, LLC

Emily DeSa, Esq., for the General Counsel.
Aaron Schlesinger, Esq., Peckar & Abramson, for the Respondent.
Adam Rhynard, Esq, (Levy, Ratner & Behroozi), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on October 19, 2004, in Brooklyn, New York. The complaint herein, which issued on July 22, 2004[1] and was

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2004.

based upon a charge and an amended charge filed on January 27 and July 20, by New York's Health & Human Service Union, 1199, Service Employees International Union, AFL–CIO, (the Union), alleges that Berkshire Nursing Home LLC, (the Respondent), violated Section 8(a)(1)(5) of the Act by instituting two changes in its employees' terms and conditions of employment, where they were permitted to park and the cost of, as well as their choice of, health insurance coverage, without prior notice to, or bargaining with, the Union.

I. JURISDICTION

The Respondent admits, and I find, that it has been a healthcare institution within the meaning of Section 2(14) of the Act, and has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

Pursuant to a petition filed by the Union on October 9, 2003, and a Stipulated Election Agreement entered into by the Union and the Respondent, an election was conducted on November 5, 2003, among the employees in the following agreed upon unit:

> All full-time and regular part-time non professional employees including the classifications of Licensed Practical Nurses, Certified Nursing Assistants, Maintenance Workers, Recreational Aides, CNA/Therapy Aides, Cooks, Dietary Workers and Housekeeping Workers employed by the Employer at its 10 Berkshire Road, West Babylon, New York facility, but excluding all Registered Nurses and other professional employees, Receptionists, Medical Records personnel, Nursing Secretary and other business office clerical employees, confidential employees, guards, LPN Nursing Care Coordinators, Shift LPN Charge Nurses, Administrators, Physical Therapy Assistants, Managers and supervisors as defined in Section 2(11) of the Act.

The Tally of Ballots showed that 110 votes were cast in favor of the Union, 20 votes were cast against the Union, and there were 9 challenged ballots, a number insufficient to affect the results of the election. On November 12, 2003, the Respondent filed objections to the election and on December 3, 2003, the Regional Director issued a Report on Objections wherein he recommended that the objections be overruled in their entirety and that a Certification of Representatives issue certifying the Union as the collective-bargaining representative of the employees in the unit described above. The Respondent filed exceptions to the Regional Director's Report and on January 14, the Board issued a Decision and Order Directing Hearing adopting the Regional Director's findings except that it found that the Respondent's Objection 2(c) raised substantial and material factual issues warranting a hearing and ordered that a hearing be held to receive evidence on that one objection. On February 9, a hearing was held on the remaining objection and on February 27, I issued a Recommended Decision on Objections wherein I recommended that the Respondent's remaining objection be overruled, and the Union be certified as the collective-bargaining representative of the employees referred to above. By Decision and Certification of Representative dated May 21, the Board adopted my findings and recommendations, and certified the Union as the collective-bargaining representative of these employees.

The Respondent has two parking lots at its facility, the south or rear parking lot and the east or side parking lot and there was no restriction on where the employees could park their cars. The employees preferred the rear parking lot because there is a direct entrance into the facility from that lot, while the side parking lot does not have such a direct entry into the building. Employees also parked on the streets adjoining the facility. On December 24, 2003, the Respondent, by William Cowen, its administrator, sent the following memorandum to all of its employees:

> EFFECTIVE JANUARY 2, 2004, starting with the morning shift, employees will not be permitted to park in the back parking lot (entrance on Little East Neck Road). Employees who choose to park on Berkshire property can park in the lot at the East end of Berkshire Road.
>
> The lighting in that area, which is also to be used by Visitors (there are some designated spots for them), has been improved. Security assistance will be provided at the change of shifts at midnight. New lines will be painted when the weather permits.
>
> This change has been made to facilitate deliveries and ambulance drop-offs and pickups and will also end the serious potential for accidents and blocking of cars that occurred in the back with all the congestion. There will be reserved parking in the back for designated staff and owners. The area that will now be empty will eventually become an area designated for resident/family use.
>
> We urge your compliance with this new procedure. Town-permitted street parking remains available to you.

On April 28, the Respondent changed this rule to allow employees working on the night shift (12 midnight to 8 a.m.), as well as specified staff members on the day shift, to park in the rear parking lot.

Employee Angela Bollerup testified that there was a back entrance to the facility "right there" at the rear parking lot and it only took her about 1 minute to walk from her car to the building. Now that she has to park in the side parking lot it takes 3 to 5 minutes to get to the facility. Prior to January 2, she parked in the side lot only when there were no spaces available in the rear lot, approximately five to ten times during her 7 years of employment with the Respondent. Prior to January 2, she noticed overcrowding and blocked cars in the rear parking lot. In addition, she testified the Respondent has not cleared the snow "right away" from the side parking lot and she has seen fellow employees fall and get hurt walking in the side parking lot, although she did not feel unsafe parking in the side lot. Cowen testified that prior to January, the Respondent had no policy regarding where employees could park: "Employees could park wherever they felt they wanted to park, either lot or on the street." He testified that since he began working for the Re-

spondent in 2000 he observed that there were a lot of problems caused by the employees' preference for the south lot: congestion, blocking of cars, double parking and accidents. He had complaints from vendors and ambulance drivers that they had difficulty getting into and out of the facility because of the congestion, causing him to go to the parking lot to inspect the situation and/or make announcements over the loudspeaker for employees to move their cars. In addition, he found that some employees on the day shift parked their car illegally in the south lot, kept the motor running, and, after the change in shifts, went out to their car and parked it in a newly opened parking space, thereby leaving their work stations. Because of these problems, he issued the December 24, 2003 memo restricting parking. The Respondent has a contract for snow removal that clears the snow from both parking lots, one following the other.

Since March 1, 2003, the Respondent's employees had their healthcare coverage through HIP. By memo dated January 26 to all eligible employees, Cowen wrote:

> Each year we evaluate our health insurance plans and the benefits provided to our eligible employees. Over the past several months, we have reviewed alternative plans from other insurers to determine which plans best suited our eligible employees. This year HIP requested a 13.7% increase to our current medical rates. We understand your concerns with the current HIP plan and rather than transfer completely from HIP and disrupt those employees that are satisfied with the network and service, we have decided to offer you three different plan options. The current HIP plan will be offered in addition to a Buy-Up HIP HMO plan and a Buy-Up Empire Direct HMO plan. Empire has the largest network of doctors and hospitals in the area.
>
> Plan Designs
>
> Every eligible employee will have the option to select one of three plans. The Core HIP plan is the same as the current plan design. The Buy-Up HIP plan has a different drug card that has no deductible and allows non-formulary drugs for a $35 copay rather than a 50% copay. Unlike the HIP Core and Buy-Up plan, Empire's HMO plan is open access and does not require you to get a referral before seeing a specialist. Empire also allows non-formulary drugs to be received via the mail order program. The three plan designs are as follows:
>
> [Description of the three available plans]

Prior to the change, Bollerup had $26.79 deducted from her weekly paycheck to cover her contribution for her health care coverage. After the change, the amount deducted from Bollerup's weekly paycheck for the same HIP coverage was $35.44. The parties stipulated that prior to the issuance of the December 24, 2003 and January 26, 2004 memos to the employees, the Respondent did not notify or bargain with the Union about the subjects of employee parking or health care coverage.[2]

Cowen testified that the Respondent revises its health insurance plans on a yearly basis. It employs a broker who reviews its health insurance plan and compares it with other available plans. Because of increased costs, the Respondent changed its coverage to HIP in March 2003. The January 26 memo to the employees was necessitated by the fact that costs for HIP coverage over the prior year had increased by 14 percent. Employees were given the choice of keeping their existing HIP coverage, but with an additional premium, or changing coverage. The new health coverage took effect on March 1. The Union never requested bargaining on this subject or the restrictions on parking in the rear parking lot.

IV. ANALYSIS

There are three distinct issues herein: did the two issues involved herein, parking lot privileges and health insurance costs, constitute mandatory subjects of bargaining? Can an employer lawfully make unilateral changes in its employees terms and conditions of employment after a union was successful in a Board conducted election, but prior to a Board certification? And did the Union waive the right to bargain about these two subjects?

In *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1162 (DC Cir. 1992), the Court stated:

> A unilateral change not only violates the plain requirement that the parties bargain over "wages, hours, and other terms and conditions," but also injures the process of collective bargaining itself. "Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent." [citation omitted]

In *Mercy Hospital of Buffalo*, 311 NLRB 869, 872 (1993), the Board found that the employer violated Section 8(a)(5) of the Act by unilaterally eliminating its 2 to 4 a.m. cafeteria hours on weekends (citing *Ford Motor Co. v. NLRB*, 441 U.S. 448 (1979)), because this service was "germane to the working environment." Clearly, the change in health insurance coverage that the employees were notified of on January 26, was a mandatory subject of bargaining, and the change violated the Act because the employees who continued with HIP coverage had to pay more for the same coverage, after the change. *Pilgrim Industries, Inc.*, 302 NLRB 591 (1991) and *Valley Counseling Services, Inc.*, 305 NLRB 959, 960 (1991).

The change in parking rules at the facility, effective January 2, is a closer issue. I found Cowen and Bollerup to be a credible and believable witness herein. The bottom line is that the employees on the day shift who had to park in the east parking lot had an extra 2 to 4 minute walk to get to the building entrance as compared to when they parked in the south parking lot prior to January 2. In *United Parcel Service*, 336 NLRB 1134 (2001), the employer operated a facility at the Oakland airport, which it leased from the Port of Oakland, and the employer's employees parked at a parking lot owned by the Port. The lot was about a 5 minute walk from the employer's facility. The Port closed that

[2] The tr. incorrectly states (at p. 26, lines 11 and 13) that, prior to making these changes, the employee did not notify the Union. The stipulation was, and should state, that the employer did not notify the Union prior to making these changes.

parking lot and notified its tenants, including the employer, that their employees would have to park at a new facility, about a mile and a half from the employer's facility. The Port operated shuttle buses every 15 to 20 minutes to and from this new parking lot, requiring the employer's employees to spend up to an additional 20 minutes to get to and from the employer's facility and their cars. The employer, which had no role in the relocation of the parking lot, subsequently notified the employees of the change and that it could do nothing to prevent the change. The Board found that employee parking was a mandatory subject of bargaining, and since the change added an additional 40 minutes to the employees' commuting time, the change had a "substantial impact upon the terms and conditions of employment" which "resulted in material changes to the employees' conditions of employment" in violation of Section 8(a)(5) of the Act. On the other hand, in *Advertiser's Mfg Co*., 280 NLRB 1185, 1193 (1986), cited by counsel for the Respondent and counsel for the Charging Party in their briefs, Administrative Law Judge Richard Scully, found that a unilateral change that prohibited employees from parking in the first row of the employee parking lot, did not violate the Act, because it ". . . at most, required a few employee to walk a few extra yards from their cars to the plant. . ." See also *Frank Leta* Honda, 321 NLRB 482, 496 (1996) and *Dynatron/Bondo Corp.*, 324 NLRB 572, 578 (1997). The instant situation falls right between UPS and Advertisers. Although the change in parking rules herein was not as substantial or material as in *UPS*, the fact that the employees clearly favored the rear parking lot indicates that it was a material and substantial unilateral change in terms and conditions of employment for these employees, and therefore violated Section 8(a)(1)(5) of the Act.

As regards the Respondent's defense that the Union had not been certified by the Board at the time these changes were made, there are numerous Board cases rejecting such a theory, such as *Food & Commercial Workers Local 1996 (Visiting Nurse Health System.)*, 336 NLRB 421, 428, which stated: "the Board has long held that an employer's obligation to bargain attaches at the time the union wins the election, and that the employer acts at its peril when it makes unilateral changes while postelection proceedings are pending." The "acts at its peril" language appears in many Board decisions. Finally, Respondent defends that because the Union never requested bargaining about these subjects, it waived the right to bargain about them. In *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013 at 1017 (1982), Administrative Law Judge Julius Cohn, as affirmed by the Board, stated:

> The other aspect of the waiver issue arises from Respondent's contention that the Union waived its right to bargain over the changes simply because it failed to request bargaining. The Board has long recognized that, where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a fait accompli.

In *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 402 (5th Cir. 1981), the Court stated: "a union cannot be held to have waived bargaining over a change that is presented to it as a fait accompli." That is precisely the situation herein. The employees were given notice on December 24, 2003 (for the parking change), and January 26 (for the health insurance change) of the changes that the Respondent was instituting. These notices did not say that the Respondent was considering these changes, which would have afforded the Union an opportunity to request bargaining and propose alternatives. Rather, these notices notified the employees that on the effective date these changes would take effect. Each was a fait accompli with no opportunity or offer to bargain. I have no doubt that the change in parking rules was promulgated for valid business and safety reasons, and the change in health insurance providers and costs was made due to the cost increases in HIP coverage. However, what Respondent should have, but did not, do was to offer to discuss these subjects with the Union, rather than simply implementing them. By changing the parking rules effective January 2, and by changing its employees' health care coverage and/or the cost of the coverage, effective March 1, the Respondent violated Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent has been a healthcare institution within the meaning of Section 2(14) of the Act and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. By unilaterally restricting its employees' right to park in its rear parking lot, and by unilaterally forcing its employees to pay a higher weekly contribution for their health insurance or, in the alternative, to choose from three health insurance plans, the Respondent violated Section 8(a)(1)(5) of the Act.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1)(5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act. As the Respondent unlawfully unilaterally restricted employees use of the rear parking lot effective January 2, I shall recommend that the Respondent be ordered to withdraw this change, and to bargain with the Union about this subject prior to implementing any changes in parking rules. As the Respondent unlawfully unilaterally changed the health care options available to its employees, as well as the costs of the HIP coverage employed by its employees, I shall recommend that the Respondent rescind this change and bargain with the Union about this subject prior to making any change therein. Respondent shall also reimburse its employees for the additional costs they had for the HIP coverage after March 1, or for any other costs that they suffered as a result of this unilateral change.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Berkshire Nursing Home LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of its employees represented by the Union, without notifying and bargaining with the Union about these subjects.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the employees' right to park in the parking lot of their choosing, and rescind the additional charge for HIP health care coverage that was effective March 1, and bargain with the Union prior to changing these, or other terms and conditions of employment, of the employees represented by the Union.

(b) Make whole its employees for the additional cost for their HIP health insurance coverage, or for any other costs that they incurred that were caused by this change.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of reimbursement to the unit employees due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in West Babylon, New York, copies of the attached Notice marked "Appendix."[4] Copies of the Notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at any time since December 24, 2003.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region, attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. December 21, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to meet and bargain with New York's Health & Human Service Union, 1199, Service Employees International Union, AFL–CIO, regarding our unilateral decisions to restrict our employees' parking privileges, to change their health care coverage, and the costs thereof, or any other term or condition of employment of these employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reinstate our past practice allowing our employees to park in either of our parking lots,

WE WILL withdraw the increased premiums our unit employees were charged for HIP health care coverage effective March 1, 2004, and WE WILL reimburse our unit employees for the extra costs they incurred that were caused by these changes in their health care coverage.

BERKSHIRE NURSING HOME, LLC

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."